Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 May 2017*

(Reference for a preliminary ruling — State aid — Debt owed to a company of which the Romanian State is the majority shareholder by a company of which that State is the sole shareholder — Transfer in lieu of payment — Definition of 'State aid' — Obligation to notify the European Commission)

In Case C-150/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania), made by decision of 3 March 2016, received at the Court on 14 March 2016, in the proceedings

Fondul Proprietatea SA

v

Complexul Energetic Oltenia SA,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Fondul Proprietatea SA, by C. Dontu, D. Petrache and A. Dăscălescu, avocați,

— the Romanian Government, by R.H. Radu, R. Mangu and M. Bejenar, acting as Agents,

— the European Commission, by L. Nicolae and P. Němečková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Romanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107 TFEU and Article 108(3) TFEU.

2 The request has been made in proceedings between Fondul Proprietatea SA ('Fondul') and Complexul Energetic Oltenia SA ('CE Oltenia') concerning the annulment of the decision of the general meeting of shareholders of CE Oltenia to accept a '*datio in solutum*' (transfer in lieu of payment) with respect to its claim against Electrocentrale Grup SA ('Electrocentrale').

Romanian Law

3 Under Article 1469(2) of the Romanian Civil Code, 'payment consists of the transfer of a sum of money or, as appropriate, the performance of any other service forming the subject matter of the obligation'.

4 Article 1609 of that code states:

'(1) Novation occurs where the debtor undertakes a new obligation in respect of the creditor, which supersedes and extinguishes the original obligation.

(2) Novation also occurs where a new debtor is substituted for the original debtor, who is released from all obligations to the creditor; the original debt is thereby extinguished. In that case, the novation occurs without the consent of the original debtor.

(3) Novation also occurs where, by the effect of a new contract, a new creditor is substituted for the original creditor, with respect to whom the debtor is discharged; the original obligation is extinguished.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 CE Oltenia, of which 77.17% of the share capital is held by the Romanian State and 21.53% by Fondul, was owed a debt totalling 28709475.13 Romanian lei (RON) (approximately EUR 6.4 million) by Electrocentrale, of which the Romanian State is the sole shareholder.

6 On 27 September 2013, the general meeting of shareholders of CE Oltenia approved the transfer to that company of the Chișcani thermal power plant (Romania), owned by Electrocentrale, as a transfer in lieu of payment ('the decision at issue in the main proceedings').

7 As the Chișcani thermal power plant was valued at RON 36 810 200 (approximately EUR 8.2 million), CE Oltenia refunded the difference between that amount and the amount of the debt contracted by Electrocentrale, paying the latter RON 8100724.87 (approximately EUR 1.8 million). Furthermore, CE Oltenia took over 280 employees of Electrocentrale working at the Chișcani thermal power plant and secured the transfer to it of emission quotas for greenhouse gases.

8 On 24 December 2013, Fondul lodged an application for a declaration of invalidity with respect to the decision at issue in the main proceedings before a court of first instance. As its application was dismissed, Fondul appealed to the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania).

9 Before that court, Fondul argued that since the Chișcani thermal power plant was not profitable, the transfer in lieu of payment at issue in the main proceedings did not procure any advantage to CE Oltenia and only benefited Electrocentrale which, free from the burden of that power plant, was able to remain in the market for the supply of electricity.

10 In those circumstances, the Curtea de Apel Craiova (Court of Appeal, Craiova) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the decision of the general shareholders' meeting of CE Oltenia — adopted with the vote of the Romanian State, represented by the Department of Energy of the Ministry for the Economy which, as a shareholder, owns 77.17% of that company's share capital — by which it was agreed (i) to extinguish Electrocentrale's debt, totalling RON 28709475.13, to CE Oltenia, by way of transfer of an asset in lieu of payment, consisting of property registered under number 70301 in the land register for the municipality of Chișcani, Brăila district, and (ii) to pay Electrocentrale the difference between the market value of the asset and the sum owed to CE Oltenia, constitute State aid within the meaning of Article 107 TFEU, that is to say: (i) does it constitute a measure financed by the State or through State resources, (ii) is it selective in nature, and (iii) may it affect trade between the Member States?

(2) If the answer to Question 1 is in the affirmative, was such State aid subject to the notification obligation laid down in Article 108(3) TFEU?'

Consideration of the questions referred

The first question

11 By that question, the referring court asks essentially whether, in circumstances such as those at issue in the main proceedings, the decision of a company of which a Member State is the main shareholder to accept a transfer in lieu of payment of an asset, which is the property of another company in which the State is the sole shareholder, in order to extinguish a debt, and to pay an amount corresponding to the difference between the estimated value of that asset and the amount of that debt, is liable to constitute State aid within the meaning of Article 107 TFEU.

12 As a preliminary point, it must be held that the European Commission's power to assess whether aid is compatible with the internal market does not preclude a national court from referring to the Court of Justice a question on the interpretation of the definition of 'aid'. Accordingly, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation of EU law to enable it to determine whether a national measure may be classified as 'State aid' under that law (judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 30 and the case-law cited).

13 According to the settled case-law of the Court, classification of a national measure as 'State aid' for the purposes of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, in particular, judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 15; of 22 October 2015, *EasyPay and Finance Engineering*, C-185/14, EU:C:2015:716, paragraph 35; and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

The condition that the measure be financed by the State or through State resources

14 It must be stated from the outset that for it to be possible to classify advantages as State aid within the meaning of Article 107(1) TFEU, first, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24 and the case-law cited, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

15 First, as regards the condition relating to the condition which requires that the advantage must be granted directly or indirectly through State resources, according to settled case-law, the definition of 'aid' is more general than that of a 'subsidy' because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, in particular, judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 131, and of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 40).

16 In that connection, the Court has already held that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21 and the case-law cited).

17 More specifically, as far as concerns public undertakings, such as CE Oltenia, the Court has also held that the State is able, by exercising its dominant influence over such undertakings, to direct the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 38).

18 Second, as regards the condition that an aid measure taken by a public undertaking must be attributable to the State, it is clear from settled case-law that that may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 55).

19 In that respect, the Court has already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities, or the fact that, apart from factors of an institutional nature linking the public undertakings to the State, those undertakings, through which the aid had been granted, had to take account of directives issued by State agencies. Other factors might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular:

— its integration into the structures of the public administration,

— the nature of the undertaking's activities and the exercise of the latter on the market in normal conditions of competition with private operators;

— the legal status of the undertaking (public law or ordinary company law);

— the intensity of the supervision exercised by the public authorities over the management of the undertaking;

— or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 55 and 56).

20 However, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State. The existence of a situation of control and the real possibilities of exercising a dominant influence which that situation involves in practice makes it impossible to exclude from the outset any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the Treaty rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 57).

21 It is for the referring court to ascertain whether the decision at issue in the main proceedings constitutes an advantage granted directly or indirectly through State resources and, in the light of the indicators set out in paragraphs 19 and 20 of the present judgment, is attributable to the Member State concerned.

Conclusion on the existence of a selective advantage

22 One of the elements constituting State aid, within the meaning of Article 107(1) TFEU, is the existence of a selective advantage granted to an undertaking.

23 Fondul takes the view that the transfer in lieu of payment at issue in the main proceedings is State aid granted to Electrocentrale on the ground that the Chișcani thermal power plant, the ownership of which was transferred to CE Oltenia, was not profitable. Therefore, the Romanian State has not acted in the public interest or in that of CE Oltenia, but solely with the aim of conferring a financial advantage on Electrocentrale, in order to maintain the latter on the electricity market.

24 In that regard, it must be recalled that a transfer in lieu of payment approved by a company of which the State is the majority shareholder does not necessarily constitute State aid.

25 According to the settled case-law of the Court, the conditions that a measure must meet in order to be regarded as 'aid', within the meaning of Article 107 TFEU are not fulfilled if the recipient undertaking, in circumstances corresponding to normal market conditions, could have obtained the same advantage as that made available to it through State resources. When a public creditor grants payment facilities in respect of a debt payable to it by an undertaking that assessment is made, by applying, in principle, the private creditor test (see, in particular, judgments of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraphs 70 and 71, and of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraphs 31 and 32).

26 Such payment facilities constitute State aid for the purposes of Article 107(1) TFEU where, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor and seeking to recover sums due to it by a debtor in financial difficulty (judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 72).

27 It is therefore for the referring court to carry out an overall assessment, taking into account all relevant evidence in the case at issue in the main proceedings, that is, in particular, the value of the asset which was the subject of the transfer in lieu of payment and the amount of the outstanding balance paid by CE Oltenia, in order to determine whether the Electrocentrale would manifestly not have obtained comparable facilities from such a private creditor (see, by analogy, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 73).

The condition that trade between the Member States be affected and that competition be distorted

28 Article 107(1) TFEU prohibits aid which affects trade between the Member States and which distorts or threatens to distort competition.

29 For the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between the Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgments of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 50, and of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraph 64).

30 However, the effect on trade between the Member States cannot be purely hypothetical or presumed. Thus, it is necessary to determine the reason why the measure concerned distorts or threatens to distort competition and is liable by its foreseeable effects to have an impact on trade between the Member States (see, to that effect, judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 64).

31 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 141).

32 In that connection, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are reduced as a result (judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67).

33 With regard to the requirement that competition should be distorted, it must be borne in mind in that regard that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 54).

34 Furthermore, the fact that an economic sector, such as the energy sector, has been the subject of liberalisation at EU level may serve to determine that the aid in question has a real or potential effect on competition and affects trade between the Member States (see, to that effect, judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 142, and of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 51).

35 As the Commission observed in its written submissions, in so far as electricity is the subject of cross-border trade, the grant of aid by the decision at issue in the main proceedings is liable to affect trade. Such aid may also distort competition on the electricity market.

36 In the case in the main proceedings, it will be for the national court to determine in fact, in the light of the foregoing criteria for interpretation, whether the two requirements examined are satisfied.

37 In the light of the foregoing considerations, the answer to the first question is that, in circumstances such as those in the main proceedings, the decision of a company of which a Member State is the main shareholder to accept a transfer in lieu of payment of an asset which is the property of another company of which that Member State is the only shareholder, in order to extinguish a debt, and to pay a sum corresponding to the difference between the estimated value of that asset and the amount of that debt is liable to constitute State aid within the meaning of Article 107 TFEU if:

— that decision constitutes an advantage granted directly or indirectly by means of State resources and is attributable to the State,

— the recipient undertaking has not obtained facilities comparable to a private creditor, and

— that decision is liable to affect trade between the Member States and distort competition.

38 It is for the referring court to ascertain whether those conditions are met.

The second question

39 If the answer to the first question is affirmative, the referring court asks by its second question, whether the State aid at issue in the main proceedings is subject to the obligation of notification referred to in Article 108(3) TFEU.

40 Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26).

41 The implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate (judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 19).

42 Whilst an assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28).

43 It follows that if the decision at issue in the main proceedings constitutes State aid for the benefit of Electrocentrale, the national authorities are required to notify that aid to the Commission before it is put into effect, in accordance with Article 108(3) TFEU.

44 Having regard to all of the foregoing considerations, the answer to the second question is that, if a national court classifies as State aid the decision of a company of which a Member State is the majority shareholder to accept a transfer in lieu of payment of an asset owned by another company of which that Member State is the sole shareholder, in order to extinguish a debt, and to refund a sum corresponding to the difference between the estimated value of that asset and the amount of the debt, the authorities of that Member State are required to notify that aid to the Commission before it is put into effect, in accordance with Article 108(3) TFEU.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **In circumstances such as those in the main proceedings, the decision of a company of which a Member State is the main shareholder to accept, in order to extinguish a debt, a transfer in lieu of payment of an asset which is the property of another company of which that Member State is the only shareholder and to pay a sum corresponding to the difference between the estimated value of that asset and the amount of that debt is liable to constitute State aid within the meaning of Article 107 TFEU if:**

   — **that decision constitutes an advantage granted directly or indirectly by means of State resources and is imputable to the State,**

   — **the beneficiary undertaking has not obtained facilities comparable to a private creditor, and**

   — **that decision is liable to affect trade between the Member States and distort competition.**

   It is for the referring court to ascertain whether those conditions are met.

2. **If a national court classifies as State aid the decision of a company of which a Member State is the majority shareholder to accept a transfer in lieu of payment of an asset owned by another company of which that Member State is the sole shareholder, in order to extinguish a debt, and to refund a sum corresponding to the difference between the estimated value of that asset and the amount of the debt, the authorities of that Member State are required to notify that aid to the Commission before it is put into effect, in accordance with Article 108(3) TFEU.**

[Signatures]